

WC 03-164

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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In the matter of)

Valor Telecommunications of Texas, L.P.)

Petition for Waiver of the 2003 X-Factor
 Reductions Under Section 61.45(b)(1)(i)
 of the Commission's Rules)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WCB Docket No. 03-16

APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission's rules,¹ Valor Telecommunications of Texas, L.P. ("Valor Texas") seeks review of the Wireline Competition Bureau's ("Bureau") Order² denying Valor Texas' petition to permanently waive the 2003 X-factor reduction.³ The Bureau acted contrary to its own precedent and the public interest, and in doing so, jeopardized the financial well-being of a rural carrier. The Bureau's Order fails to provide a sustainable explanation for its departure from its own policies. As the Bureau concluded properly last year, "the application of the X-factor would be unduly

¹ 47 C.F.R. § 1.115(b)(2)(i).

² *Valor Telecommunications of Texas, L.P. Petition for Waiver of the 2003 X-Factor Reduction Under Section 61.45(b)(1)(i) of the Commission's Rules*, Order, DA 03-1928 (June 11, 2003) ("2003 Order").

³ *Valor Telecommunications of Texas, L.P. Petition for Waiver of the 2003 X-Factor Reduction Under Section 61.45(b)(1)(i) of the Commission's Rules*, WCB/PPD Docket No. 03-16 (filed Apr. 14, 2003) ("2003 Request").

burdensome this year.”⁴ The Commission should reverse the Bureau’s Order and grant Valor Texas’ requested relief.

I. Background

Valor Texas acquired two partial study areas from GTE in 2000, and began providing service under the CALLS plan in September 2000. In all three years of operation, Valor Texas has earned diminishing interstate returns well below 10.25 percent: 6.7, 5.7, 5.37 percent respectively.⁵ Last year, faced with two consecutive low-end adjustments, Valor Texas (along with Valor New Mexico) sought a blanket waiver of the CALLS plan’s X-factor reductions in years in which a low-end adjustment is required. In June 2002, the Bureau declined to grant a blanket waiver as requested, and denied Valor New Mexico’s request in its entirety.⁶

The Bureau, however, did delay the imposition of Valor Texas’ 2002 X-factor reductions until 2004, the only X-factor-free year under the CALLS plan. The Bureau’s decision was based on three challenges facing Valor Texas: “consecutive low earnings; acquisition of partial study areas, and the incurrence of substantial capital expenditures due to circumstances beyond Valor’s control.”⁷ The Bureau noted that it would “consider

⁴ *Valor Telecommunications of Texas and Valor Telecommunications of New Mexico Petition for Wavier of the Operation of the X-factor in the Price Cap Indices Formula Set Forth in § 61.45(b)(1)(i)*, Order, DA 02-1325 (June 7, 2002) (“2002 Order”).

⁵ Solely because of the availability of the low-end adjustment backstop mechanism, Valor Texas’ total revenues have been slightly above 10.25 percent in each year.

⁶ 2002 Order.

⁷ *Id.*, ¶ 15.

additional relief in the future” and, further stated that, “[i]deally, we would prefer more than two years of data to support Valor’s request, but we conclude that Valor should not have to wait additional years to show that its situation will not improve absent our intervention.”⁸

Valor Texas has become the first carrier to seek three consecutive low-end adjustments in the history of the price cap rules, due to another year of low returns even with the Bureau’s affirmative relief. Accordingly, this year Valor Texas sought broader relief than it obtained from the Bureau last year, a permanent waiver of the 2003 X-factor reductions.

II. The Bureau departed from its own precedent, the Commission’s rules, and the public interest in rejecting Valor Texas’ request

The Bureau rejected Valor Texas’ 2003 waiver request outright. In doing so, the Bureau failed to follow its own precedent by not acknowledging the unique circumstances under which Valor Texas operates; refused to provide Valor Texas any affirmative relief; and proposed other remedies unavailable to Valor Texas under the rules. The record before the Commission supports a grant of greater relief to alleviate the problems facing Valor Texas.

The Bureau failed to adhere to its own policy. Concluding that the low-end adjustment “provides adequate relief,” the Bureau provided Valor Texas with no relief

⁸ *Id.*, ¶¶ 17, 15.

for the access year beginning July 1, 2003.⁹ This is at direct odds with its ruling last year. Ironically, the Bureau dismissed the request as “rel[ying] largely on the same circumstances” as last year’s request.¹⁰ That statement admits the gravamen of Valor Texas’ claim: it is the confluence of the same three complications (and others) that justifies relief this year. The Bureau fails to provide a sustainable explanation as to why the same circumstances do not warrant some relief this year.¹¹

The Bureau asserts that Valor Texas “identified only about \$229,000 in additional depreciation expense.”¹² The Bureau then ruled that Valor Texas had not shown good cause for its wavier request due to the lack of extraordinary expenditures last year.

First, this does not fairly characterize the record. It is true that Valor Texas was forced to expend ever greater capital investments due to unanticipated events in previous years, but ongoing costs associated with extraordinary events in prior years, coupled with additional capital outlays this year, continue to pose problems for Valor Texas’ operations.¹³ Valor Texas provided data to the Commission that for every \$1 million expended in previous years, Valor Texas will have to pay \$76,330 in depreciation

⁹ 2003 Order, ¶ 9.

¹⁰ *Id.*, ¶ 8.

¹¹ The Bureau did reject in the 2003 Order deferral of the X-factor reductions until the July 1, 2003 access year. *See* 2003 Order, fn 47. However, the Bureau fails to recognize that Valor Texas agreed that it would accept a deferral as alternate relief if the Bureau rejected its waiver request.

¹² 2003 Order, ¶ 8.

¹³ *See Letter from Gregory J. Vogt, counsel, to Ms. Marlene H. Dortch, Secretary, WCB/PPD Docket No. 03-16 (May 22, 2003) (“May 22 Letter”).*

expenses.¹⁴ Valor Texas provided the \$229,000 figure as an example of the types of ongoing costs affecting Valor Texas, not as a comprehensive list of such costs.¹⁵

Second, the Commission's rules require "unique or unusual factual circumstances" to support a waiver request. The Bureau placed disproportionate weight on one of the factors it recognized last year, unexpected capital expenditures, yet the waiver request is based on Valor Texas' three consecutive low-end adjustments, which is unprecedented in the history of the price cap rules. The individual factors contributing to low interstate returns are significant, but not the sole reason supporting grant of the waiver.

The Bureau mischaracterized Valor Texas' requested relief. Last year, the Bureau created its own relief for Valor Texas, namely the delay of X-factor reductions until an X-factor free year. Due to the idiosyncrasies of the temporary CALLS regime, set to expire in July 1, 2005, there are no additional X-factor free years. Valor Texas, in its petition seeking greater relief, stated that applying the same relief as last year would be potentially problematic.¹⁶ In meetings with the Bureau staff, however, Valor Texas stated that a deferral of the X-factor reduction would be preferable to no relief at all.¹⁷ The Bureau did not recognize Valor Texas' willingness to take this risk of an X-factor

¹⁴ *Id.*

¹⁵ *May 22 Letter*, 1.

¹⁶ *2003 Request*, 9-10.

¹⁷ *See Letter from Gregory J. Vogt, counsel, to Ms. Marlene H. Dortch, Secretary, WCB/PPD Docket No. 03-16 (June 9, 2003) ("June Ex Parte").*

deferral to 2004. Failure to grant this alternate relief is directly contrary to last year's explicit finding that the low-end adjustment was an insufficient remedy for Valor Texas.

Valor Texas is fully aware of the need to maintain the integrity of the Commission's access charge reforms and price cap rules, and recognizes that the price cap rules work for the vast majority of carriers (including Valor Texas' sister affiliates). The Bureau rejected Valor Texas' request with the broad statement that it has never before waived its price cap rules.¹⁸ The current situation is unprecedented. There has never been a carrier facing such a cycle of anemic returns based on a purchase of partial study areas, and it is that peculiarity that justifies a waiver and necessitates a more flexible approach.

The Bureau relied on alternative remedies that are not available. The Bureau's suggestion that there are remedies within the price cap rules other than the one Valor Texas requested does not save the Order's erroneous conclusion. The only remedy referred to by the Bureau, an above-cap filing, is not available to Valor Texas. Carriers seeking an above-cap filing must provide the Commission with four years of cost support.¹⁹ Valor Texas has only been in existence for three years. Thus, Valor Texas would have to seek a waiver of the above-cap filing rule in order to even file such a

¹⁸ 2003 Order, ¶ 13.

¹⁹ *Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 3107 at ¶ 479 (1989) ("LEC Price Cap Order") (above cap filing requires cost support for "the most recent four years under price cap regulation"); see also *Policy and Rules Concerning Rates for Dominant Carriers*, Further Notice of Proposed Rulemaking, 3 FCC Rcd 3195, 3375 at ¶ 319 (1988) (an above cap filing requires "data covering a multi-year period in order to evaluate a claim" in order to "avoid carriers benefiting from imprudent business practices").

request. The Commission has never granted an above-cap filing, and it is, therefore, hard to conceive that the Bureau would look favorably on granting a waiver to approve an above-cap filing with incomplete information.²⁰ Nevertheless, the Bureau wrongly held that “in light of other relief available to address Valor Texas’ low earnings, relief that is provided for in our current rules, Valor Texas has not shown good cause for a waiver.”²¹

There is no other relief currently available to Valor Texas without filing a waiver of the rules, and the unavailability of the above-cap filing only reinforces the extraordinary circumstances in which Valor Texas operates, further undermining the Bureau’s inflexible approach. Valor Texas correctly analyzed that its waiver request was a “more timely, targeted and limited remedy within the price cap rules” than an above cap filing or any other potential relief.²²

III. Requested Relief

The Bureau has placed Valor Texas in an untenable situation by inflexibly applying its price cap and access charge rules, with serious consequences to Valor Texas. No other carrier has required three consecutive one-time low-end adjustments, or suffered

²⁰ In fact, the low-end adjustment was intended, in part, to limit above-cap filings because of their intrinsic difficulty and complexities. *LEC Price Cap Order*, 3110-11 at ¶ 488 (“We would not anticipate that above-cap rates would be routinely filed or granted.”); *Access Charge Reform*, Fifth Report and Order, 14 FCC Rcd 14221, 14306-07 at ¶ 166 (1999) (“*Pricing Flexibility Order*”) (“We have retained the low-end adjustment mechanism in part to avoid costly above-cap filings.”).

²¹ *2003 Order*, ¶ 15. Other potential avenues of relief are not available to Valor Texas. For instance, Valor cannot change Valor Texas to rate of return, because of the all-or-nothing rule. See 47 C.F.R. § 61.41(c)(2).

²² *Valor Texas’ Reply to Oppositions to Petition for Waiver of the 2003 X-factor Reductions Under Section 61.45(b)(1)(i) of the Commission’s Rules*, WCB/PPD File No. 03-16, 10 (May 14, 2003).

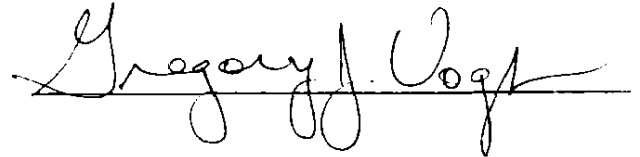
annual low single-digit interstate returns. It is illogical to conclude that Valor Texas' inability to end the cycle of low returns last year even with Bureau aid justifies no relief this year, especially given that the Bureau agreed that relief was necessary last year.

Accordingly, Valor Texas requests that the Commission overturn the Bureau's Order in its entirety, granting Valor Texas' petition waiving the 2003 X-Factor reductions. At a minimum, Valor Texas requests that the Commission delay the 2003 X-factor reductions until the first X-factor-free year, consistent with the Bureau's relief last year.

Respectfully submitted,

VALOR TELECOMMUNICATIONS OF TEXAS, L.P.

By:

A handwritten signature in black ink, appearing to read "Gregory J. Vogt", written over a horizontal line.

William M. Ojile, Jr.
Senior Vice President, General Counsel
and Secretary
VALOR TELECOMMUNICATIONS, LLC
201 E. John Carpenter Freeway
Suite 200
Irving, TX 75062
972.373.1282

Gregory J. Vogt
Bradley K. Gillen
WILEY REIN & FIELDING LLP
1776 K Street, NW
Washington, DC 20006-2304
202.719.7000

Its Attorneys

July 11, 2003

CERTIFICATE OF SERVICE

I, Bradley K. Gillen, hereby declare that copies of the foregoing application for review were delivered by hand or by U.S. mail, this day, July 11, 2003, to the following:

Marlene H. Dortch (hand delivery)
Secretary
Federal Communications Commission
TWA-A325
445 Twelfth Street, S.W.
Washington, D.C. 20554

Mark C. Rosenblum
Lawrence J. Lafaro
Judy Sello
AT&T Corp.
Room 3A229
One AT&T Way
Bedminster, New Jersey 07921

Aaron Goldschmidt (hand delivery)
Wireline Competition Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Norina Moy
Richard Juhnke
Suite 400
401 9th Street, NW
Washington, DC 20004

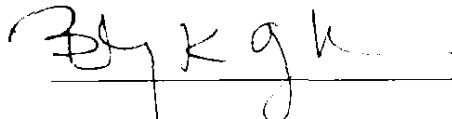
Counsel for Sprint Corporation

Pricing Policy Division (hand delivery)
Room 5-A121
Wireline Competition Bureau
445 Twelfth Street, SW
Washington DC 20554

Qualex International (hand delivery)
Portals II
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554

Alan Buzacott
1133 19th Street, N.W.
Washington, DC 20036

Counsel for WorldCom, Inc. d/b/a MCI



Bradley K. Gillen